TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 196.

MATTHEW BAIRD, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED OCTOBER 12th, 1875.

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1 *Petition.—Filed May 2, 1870.*

United States Court of Claims, No. 6171.

To the honorable the judges of the Court of Claims:

Your petitioner, Matthew Baird, of the city of Philadelphia, in the State of Pennsylvania, respectfully shows to your honors:

That in the year 1864 he was engaged in business with Matthew W. Baldwin, under the firm-name of M. W. Baldwin & Co., in the manufacture of locomotive-engines, and they were proprietors of the extensive establishment known as M. W. Baldwin & Co.'s Locomotive Works, in the city of Philadelphia, which is the largest of its kind in the United States.

That the said Matthias W. Baldwin died on or about the seventh day of September, 1866, leaving your petitioner the surviving partner of said firm.

That on the 17th day of March, 1864, your petitioner's firm were under contract with various private parties to furnish eighty-five engines at various times between that date and the 19th of November following, and all the resources of their establishment were not more than equal to the fulfilment of said contracts during that period.

That in the said month of March, 1864, the Government of the United States, having urgent need for engines for the use of the Army in Tennessee, in order to equip the lines of military communication,

2 Colonel Daniel C. McCallum, director and general manager of military railroads of the United States, was authorized by the President to procure them from all engine-builders, and called upon your petitioner's said firm to ascertain whether they could furnish some of the said engines, but, in consequence of the condition of the work in their said establishment, as hereinbefore stated, your petitioner's firm could not commence furnishing to the Government any engines prior to the 21st of November following unless they should postpone the execution of private orders, and should use, to build engines for the Government, the materials and partly-finished work prepared to fill such private orders. And the exigency of the case being *not* such as to admit of any delay, the said Col. Daniel C. McCallum, being thereto duly authorized by the United States, gave to your petitioner's firm a peremptory order, hereinafter set forth, whereby he required them to furnish for the United States fifteen engines of the kind therein described, to the exclusion of all private interests and contracts.

That at the date of the said order the prices of all materials which enter into the construction of engines had been for a long time steadily rising, and were expected to continue to rise for a long time thereafter. And Colonel McCallum was aware that such was the case from statements to him made by your petitioner's firm, as well as from the usual sources of information, and knew that if your petitioner's firm should postpone the execution of the said private orders until after the completion of the engines desired by him, the cost of building the said engines for private parties would be largely increased by the rise of prices while their construction was delayed.

And, in giving the said order, it was not the intention of the said Col.

3 McCallum to secure for the United States any advantage other than the delivery of the said engines in advance of all private orders; and therefore, as to the price, it was intended that the said firm should receive such compensation as would have been paid by private parties ordering engines at that time; that is to say, such price

as would be just and fair at the time when such engines could have been manufactured by the said firm, which would have been from the 21st of November to the 31st of December, 1864. But inasmuch as the said firm were to deliver the said fifteen engines for the United States immediately, it was necessary to so arrange the terms that a partial payment could be made on the delivery of the engines; and it was therefore agreed and embodied in the papers signed by the parties, as herein set forth, that a certain price should be paid in cash on delivery, and further allowances should be made thereafter so as fully to compensate the said firm for the said engines, and also to indemnify them against all damage resulting from the postponement of private orders.

And the amount to be paid on delivery was fixed as follows, that is to say: The engines desired by Col. McCallum were similar to certain engines built by your petitioner's firm for the Louisville and Frankfort and Lexington and Frankfort Railroads, by agreement of November 9, 1863, and taking the price of those engines as a basis, and adding thereto the value of certain alterations required by Col. McCallum, it was estimated that the value of the engines, of the kind ordered by Col. McCallum, had the same been contracted for and deliverable on the 9th of November, 1863, would have been $18,947.74 at the then ruling prices of labor and materials.

And thereupon the said Col. D. C. McCallum addressed to the said M. W. Baldwin & Co. the order hereinbefore referred to, in the words following, to wit:

4 "OFFICE OF DIRECTOR AND GENERAL MANAGER
"MILITARY RAILROADS, U. S.,
"*New York, March* 17, 1864.

"Mess'rs M. W. Baldwin & Co., *Philadelphia:*

"GENTLEMEN: In pursuance of the authority in me vested, I do hereby direct you to construct, at the earliest practicable period, fifteen (15) locomotive engines, of five (5) feet gauge, for the use of the United States Government, to the exclusion of all other interests or contracts whatever, it being understood that you will be indemnified for any damage resulting from a compliance with this order. In replacing any engines taken from other parties in filling this order, you are authorized to charge the Government any advance in the cost of materials and labor over the cost of these on the 9th day of November, 1863, this being the date of a certain contract made by you with the Louisville and Frankfort and Lexington and Frankfort Railroad Co., upon which the value of the fifteen (15) locomotives above referred to was based.

"D. C. McCALLUM,
"*Col., Director and General Manager M. R. R. U. S.*"

To which order the said M. W. Baldwin & Co. replied as follows, to wit:

"PHILADELPHIA, *March* 17, 1864.

"Col. D. C. McCALLUM,
"*Director and General Manager M. R. R. U. S.:*

"SIR: In compliance with your order of this date, we will furnish the United States fifteen (15) locomotive-engines, with cylinders 16 x 24; four driving-wheels, five feet diam.; 153 copper flues, eleven feet long and two inches diameter; two pumps, and one No. 5 injector. Tenders of 1,800 gallons capacity, on two trucks, eight wheels, same as Penn. Railroad, standard gauge, five feet. The whole number to

5 have precedence of all other work whatever, and to be finished with all possible dispatch. For which we are to receive on delivery the sum of eighteen thousand nine hundred and forty-seven dollars seventy-two cents for each engine and Government tax.

"This price is based upon a contract made with the Louisville and Frankfort and Lexington and Frankfort Railroad on the 9th of November, 1863.

"M. W. BALDWIN & CO."

And Col. McCallum endorsed thereon as follows:

"The above is hereby accepted.

"D. C. McCALLUM,
"*Col., Director and General Manager M. R. R. U. S.*"

And the said M. W. Baldwin & Co., desiring evidence of the authority of the said McCallum to act in the premises, the Secretary of War wrote them a letter in the following words, to wit:

"WAR DEPARTMENT,
"*Washington City, March* 22, 1864.

"GENTLEMEN: Colonel Daniel E. McCallum, general manager of Government railways in the Departments of the Cumberland, of the Ohio, and of the Tennessee, has been authorized by this Department to procure locomotives, without delay, for the railways under his charge.

"In order to meet the wants of the military departments of the Government, you will deliver to his order such engines as he may direct, whether building under orders for other parties or otherwise, the Government being accountable to you for the same.

"The urgent necessity of the Government for the immediate supply of our armies operating in Tennessee renders the engines indis-
6 pensable for the equipment of the lines of communication, and it is hoped that this necessity will be recognized by you as a military necessity paramount to all other considerations.

"By order of the President.

"EDWIN M. STANTON,
"*Secretary of War.*

"Mess'rs BALDWIN & CO., *Philadelphia, Pa.*"

Your petitioner further shows that, by the true intent and meaning of the said contract, his firm were entitled to receive, on the delivery of each engine, the sum of $18,947.72, and 3 per cent. additional for tax, $568.43; making $19,516.15 in cash. And thereafter, as soon as the advance in the cost of materials could be ascertained and computed, and applied by calculation to the price of the engines, the said firm were entitled to receive a further allowance, and equal to the advance on the labor and materials employed and used in said engine, over and above the cost of such labor and materials on the 9th day of November, 1863. And they were also entitled to receive, when they should have completed the engines ordered by private parties, such further sum as would indemnify the said firm for all damage resulting from the postponement of said private engines. So that in said contract three distinct payments were contemplated:

First. An agreed sum to be paid in cash on the delivery of each engine.

Second. A further sum computed and ascertained to be the advance in cost of the labor and materials used in said engines over the cost thereof on the 9th November, 1863.

Third. Indemnity for all damage that might be sustained in consequence of postponing private orders, to be ascertained after the settlement with those whose orders had been postponed.

7 That your petitioner's firm proceeded to fill the order given by Colonel McCallum as aforesaid, and delivered the first of said engines on the 3d day of May, 1864, and the last one on the 30th of June following, thus completing and delivering to the United States all the said fifteen engines, and for each received the sum of $18,947.74, and the Government tax, three per cent., making the cash payment agreed upon $19,516.15 for each engine on delivery, and for all the sum of $292,742.25.

That to fulfil the order of Gen. McCallum your petitioner's firm took from other parties fifteen other 'ngines, in the following manner, that is to say: The said firm had contracted to deliver to other private parties the 40th, 41st, 42d, and so on up to the 119th engines, in the order in which engines should be constructed in their said establishment, and had on hand or had ordered all the materials necessary to construct a large number of the same. But instead of delivering the said numbered engines to the said private parties, the said firm deferred the completion of the whole 85 engines for a period of sixty days, and made for and delivered to the United States fifteen engines, which was the mode of taking the same from private parties within the meaning and intent of the said contract. And immediately thereafter the said firm recommenced the construction of engines for the private parties, and replaced the said fifteen engines by building for the said private parties fifteen other engines, and in so doing employed labor and materials the cost of which greatly exceeded the cost thereof on the 9th day of November, 1863. And your petitioner avers that the advance in cost of the labor and materials used in the said fifteen engines replaced to private parties, over the cost thereof on the 9th of November, 1863, was $128,276.50, and that the cost of the materials for the fifteen engines built for the United States, over the cost of the same on the 9th of November, 1863, was $128,276.50.

8 And your petitioner shows that his said firm were entitled to receive the said amount of $128,276.50 in addition to the cash payment of $18,947.74 for each engine, and claimed the said amount from the United States, but the said United States paid thereof the sum of $93,507.75, and refused to pay more, assigning as reason for said refusal that the War Department had decided to pay for each engine in all $25,000 and Government tax, $750, as appears by the following official report:

"WASHINGTON, *January* 23, 1865.

"To Mess'rs M. W. BALDWIN & Co.:

"GENTS.: I am in receipt of your letter of the 20th. I cannot give you an official reply, as I have nothing to do in regard to the settlement of the claims.

"As I understand the matter, owing to the very great difference in the prices for damages of the several manufactories, an average of the whole was made, which average made the engines come to $25,750 each, including the tax.

"Your fifteen (15) engines at that rate amounted to $386,250.00, but

as you had on hand a larger amount of material that could not be used for our engines, there was added as interest $4,000.

"Making	$390,250 00
"Deduct amount paid by me	292,742 52
"Leaving a balance due of	$97,507 75

"I give you the above information I have received of the engines.

"Yours, respectfully,

"H. L. ROBINSON."

And your petitioner claims in this suit the residue of the
9 amount of advance in labor and materials over the cost of the same on the 9th of November, 1863, which residue is the difference between the $128,276.50 claimed and Government tax thereon, ($3,848.29,) in all, $132,124.79, and the $93,507.75 paid, making the amount of residue $38,617.04 which your petitioner demands in this suit.

Besides this amount, your petitioner has a claim against the United States for indemnification for the postponement of prior orders, which he has set forth in another petition, and is prosecuting in another suit in this court.

And your petitioner says that he has, and the said Matthew W. Baldwin had in his life-time, always borne true allegiance to the Government of the United States, and neither of them ever gave any aid or comfort to the rebellion against the said Government.

M. BAIRD.

STATE OF PENNSYLVANIA,
City and County of Philadelphia:

On this 29th day of April, 1870, before the undersigned, alderman and justice of the peace in and for the city and county of Philadelphia, personally appeared Matthew Baird, and subscribed the foregoing petition in my presence; and being duly sworn, made oath that no assignment or transfer of the claim set forth in the said petition, or of any part thereof, or any interest therein, has been made; that he is justly entitled to the amount therein claimed from the United States, after deducting all just credits and offsets; and that he believes the facts as stated in the said petition to be true.

[SEAL.]

J. R. MASSEY,
Alderman and ex-o. J. P.

10 STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

I, Richard Donagan, prothonotary of the court of common pleas of said county, do certify that Jacob R. Massey, before whom the annexed affidavit was made, was at the time, and now is, an alderman and ex-officio justice of the peace of the city of Philadelphia, duly commissioned and qualified to administer oaths and affirmations and to take acknowledgments, &c., and to all whose acts as such full faith and credit are and ought to be given, as well in courts of judicature as elsewhere.

In testimony whereof I have hereunto set my hand and affixed the seal of said court this twenty-ninth day of April, A. D. 1870.

[SEAL.]

R. DONAGAN,
Prothonotary.

11 In the United States Court of Claims, December term, A. D. 1869.

MATTHEW BAIRD
vs.
THE UNITED STATES. } No. 6171.

And the said defendants, by their Attorney-General, come and make answer to the petition of the claimant herein; and, not confessing the same, or any part thereof, deny each and every the allegations therein contained, and call for strict proof of the same.

And as to so much of the said petition as sets forth and avers that the said United States are indebted to the said claimant in the sum of thirty-eight thousand six hundred and seventeen dollars and four cents, the said defendants say that they are not indebted to the said claimant in the said sum of money, nor any part thereof.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and never voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the said defendants deny the said allegation.

THO'S H. TALBOT,
Assistant Attorney-General.

Filed July 2, 1870.

12 In the Court of Claims of the United States, December term, 1873.

MATTHEW BAIRD
vs.
THE UNITED STATES. } No. 6171.

Now come the defendants, by their Attorney-General, and say that the claimant herein should not further have or maintain his suit against the defendants, for the reason that the petition of the claimant was not filed in this court nor transmitted to it within six years after the claim therein set forth first accrued.

Wherefore the defendants ask judgment, &c.

JOHN GOFORTH,
Ass't Att'y-General.

Filed Dec. 11, 1874.

13 In the Court of Claims.

MATTHEW BAIRD
vs.
THE UNITED STATES. } 6171.

At a Court of Claims held at the Capitol, in the city of Washington, the 17th day of May, A. D. 1875, judgment was ordered to be entered up as follows:

The court, upon due consideration of the premises, find in favor of the defendants, and do order, adjudge, and decree that the said petition be dismised.

By the court.

A true copy of record.

14 In the Court of Claims, Dec. term, 1874.

MATTHEW BAIRD
vs.
THE UNITED STATES. } No. 6171.

The claimant prays an appeal to the Supreme Court of the United States from the judgment of the Court of Claims in this case.

CARLISLE & McPHERSON,
Att'ys for Claimant.

Filed June 7, 1875.

AT CHAMBERS.

Allowed.

C. D. DRAKE,
Chief-Justice.

15 In the Court of Claims of the United States.

MATTHEW BAIRD
vs.
THE UNITED STATES. } No. 6171.

Findings of fact.

1. Mess'rs M. W. Baldwin & Co., of whose copartnership Matthew Baird, the claimant, was a member, and is now the surviving partner, on the 17th of March, A. D. 1864, entered into a contract with the defendants, which is embodied in the following correspondence:

"OFFICE OF DIRECTOR AND GEN'L MANAGER
"MILITARY R'ROADS U. S.,
"*New York, March* 17, 1864.

"Mess'rs M. W. BALDWIN & Co.,
"*Philadelphia:*

"GENTLEMEN: In pursuance of the authority in me vested, I do hereby direct you to construct, at the earliest practicable period,
16 fifteen (15) locomotive-engines, of five (5) feet gauge, for the use of the United States Government, to the exclusion of all other interests or contracts whatever, it being understood that you will be indemnified for any damage resulting from a compliance with this order. In replacing any engine taken from other parties in filling this order, you are authorized to charge the Government any advance in the cost of materials and labor over the cost of these on the 9th day of November, 1863, this being the date of a certain contract made by you with the Louisville and Frankfort and Lexington and Frankfort Railroad Co., upon which the value of the fifteen (15) locomotives above referred to was based.

(Signed) "D. C. McCALLUM,
"*Col., Director and Gen'l Manager M. R. R. U. S.*"

True copies:

M. I. LUDINGTON,
B't L't Col. and Q. M., U. S. A.

17 "PHILADELPHIA, *March* 17, 1864.

"Col. D. C. McCALLUM,
"*Director and Gen'l Manager M. R. R. U. S.:*

"SIR: In compliance with your order of this date, we will furnish the United States fifteen (15) locomotive engines, with cylinders 16×24; four driving-wheels, 5 feet diam.; 153 copper flues, 11 feet long and 2 inches diameter; 2 pumps and one No. 5 injector; tender of 1,800 gallons capacity, on two trucks, 8 wheels, same as Penn'a R. R'd, standard gauge, 5 feet. The whole number to have precedence of all other work whatever, and to be finished with all possible dispatch, for which we are to receive, on delivery, the sum of eighteen thousand nine hundred and forty-seven $\frac{72}{100}$ dollars for each engine and Government tax. This price is based upon a contract made with the Louisville and Frankfort and Lexington and Frankfort Railroad, on the 9th of Nov., '63.

(Signed) "M. W. BALDWIN AND CO.

"The above is hereby [accepted.]

(Signed) "D. C. McCALLUM,
"*Col., Director and Gen'l Manager M. R. R. U. S.*"

18 "WAR DEPARTMENT,
"*Washington City, March 22nd*, 1864.

"GENTLEMEN: Colonel Daniel E. McCallum, general manager of Government railways in the Departments of the Cumberland, of the Ohio, and of the Tennessee, has been authorized by this Department to procure locomotives without delay for the railways under his charge.

"In order to meet the wants of the military dep'ts of the Government, you will deliver to his order such engines as he may direct, whether building under orders for other parties or otherwise, the Government being accountable to you for the same. The urgent necessity of the Government for the immediate supply of our armies operating in Tennessee renders the engines indispensable for the equipment of the lines of communication; and it is hoped that this necessity will be recognized by you as a military necessity paramount to all other considerations.

"By order of the President.

(Signed) "EDWIN M. STANTON,
"*Secretary of War.*

19 "Mess'rs BALDWIN AND CO.,
"*Philadelphia, P'a.*"

2. In pursuance of said contract, said M. W. Baldwin and Co. constructed and delivered to the defendants fifteen engines, at intervals of four or five days, between May 3 and June 30, 1864, which said engines were accepted by the defendants, and the price named in the contract, $18,947 $\frac{72}{100}$ for each engine, was paid to said contractors on said delivery.

3. On the 14th of September, A. D. 1864, said M. W. Baldwin and Co. presented a claim to the defendants for the difference in the cost of the engines, from the advance in materials and labor from Nov. 9, 1864, to dates of delivery..... $141,491 70
To which they added the United States excise tax..... 4,244 76
And interest 5,821 71

Making their whole claim therefor $151,558 17

This claim was audited by the Quartermaster's Department,
20 and the amount of $97,507.75 was found due and allowed; and it was also audited by the Third Auditor, who found due and allowed the same amount; and said allowance was approved by the Second Comptroller. Said amount was paid to M. W. Baldwin and Co. by draft dated April 8, 1865, payable to their order, and was accepted by them without protest, and by them endorsed and paid by the defendants. No receipt was given therefor by said M. W. Baldwin and Co., except by the endorsement of said check.

4. Subsequently said claimant brought an action on said contract in this court, and recovered $23,750, as damages resulting from a compliance with said contract to the exclusion of all other interests or contracts, as more fully appears in the reports of said case in this court and the Supreme Court.—(5 C. C. R., 358, and 8 C. C. R., 13.)

5. And the court find that the true advance in the actual cost of materials and labor in constructing said engines, between the 9th of
21 November, 1863, to the respective times of delivery, was $38,617.04 beyond the amount allowed by the Quartermaster's Department and the accounting-officers, as stated in the third finding.

Conclusion of law.

On the facts found the claimant is not entitled to recover.
By the court.

22 In the Court of Claims of the United States.

MATTHEW BAIRD
vs.
THE UNITED STATES. } No. 6171.

And now comes the Attorney-General, on behalf of the United States, and requests the court to find the following facts in the above case:

1. That the price of copper flues was $1,578.99 for each engine.

2. The price of copper flues was estimated in making up the original basis-price.

3. That upon said basis-price an advance of more than $6,000 per engine has been allowed and paid by draft dated April 8, 1865.

4. That of the amount of $38,617.04, claimed in the petition for the advance in the cost of materials and labor, the sum of $23,684.85, or more, for copper flues forms a part.

JOHN GOFORTH,
Assistant Attorney-General.

23 United States Court of Claims.

MATTHEW BAIRD
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The defendants having filed requests for four additional findings of fact, the court makes the following answers thereto:

To the 1st. The price of copper flues for each engine was, on the 9th of November, 1863, $1,783.98, and on the 1st of July, 1864, $2,255.22.

To the 2nd. The original contract, set forth in the findings, required the flues to be of copper, and the original basis-price therein fixed covers the cost of the copper flues.

The third request is declined because the amounts allowed and paid to the claimant are specifically mentioned in the original findings.

24 The 8th is declined because not warranted by the evidence.

By the court.

NOTE.—The court filed no opinion in this case.

25 In the Court of Claims.

MATTHEW BAIRD
vs.
THE UNITED STATES. } No. 6171.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above entitled cause and the final judgment of the court thereon; of the application of the solicitors for the claimant for the allowance of an appeal, as filed in the clerk's office June 7, 1875, and of the order of the chief justice of said court allowing the same; of the findings of fact by the court and the conclusion of law thereon; of the request for additional findings by the defendants, and the rulings of the court thereon.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Washington, this eleventh day of October, 1875.

[SEAL.] JOHN RANDOLPH,
Ass't Clerk Court of Claims.

(Indorsement on cover:) No. 190. Matthew Baird, appellant, vs. The United States. Court of Claims. Filed 12th October, 1875.

In the Supreme Court of the United States.

OCTOBER TERM, 1877.

MATTHEW BAIRD
vs.
THE UNITED STATES. } No. 196.

BRIEF FOR APPELLANT.

This is an appeal from the Court of Claims.

The Case.

In March, 1864, the War Department was in urgent need of a number of locomotive engines for use on military railroads, and directed the claimant's firm, known as Baldwin & Co., to deliver such engines as General D. E. McCallum should require, whether building under orders for private parties or otherwise, (Rec., p. 8, fol. 18,) and General McCallum required them to construct fifteen to the exclusion of all private orders, promising to indemnify them for any damage resulting from their compliance. At that time values were so unsettled that the price or cost of such engines could not be determined with any reasonable certainty, and to form a basis of settlement and arrive at a price the following agreement was made:

(1.) The builders were to receive on delivery of each engine the sum of $18,947.72, that being the value of engines adapted for western railroads on the 9th of November, 1863. Rec., p. 8, fol. 17. The western roads were of a peculiar gauge, 5 feet, and engines then building for the roads, could not be used without alteration.

(2.) They were to be paid also the rise of labor and

materials from November 9, 1863, to the date of the delivery of the engines, (Rec., p. 7 fol. 16) and.—

(3.) They were to be indemnified against damage resulting from their laying aside private orders to build engines for Government. Rec., p. 7, fol. 16.

(1.) Upon delivery of the engines the fixed part of the price was paid.

(3.) By a judgment of the Court of Claims, stated in the findings (No. 4, Rec. 9), which was affirmed by this court, the builders were indemnified for loss occasioned by their delaying fifteen engines then under orders for private parties to construct the fifteen for the United States.

(2). This suit is now brought for the contingent part of the price, viz., the rise in labor and materials.

As to that the finding is (No. 3, p. 8, fol. 19) that the claimant presented his account showing the rise of labor and material used in the engines from November 9, 1863, to dates of delivery, taken as the dates when the same were replaced, to have been..... $141.491 70

On which the United States tax was.....	4.244 76
And interest.....	5.821 71
	151.558 17
Of which the United States paid.....	97,050 75
Difference.....	54.050 42

On revising this claim for suit, and in the light of the testimony taken in the suit for indemnity, the claim was reduced to $38,617.04.

And the Court has found "that the true advance in the actual cost of labor and materials in constructing said engines between the 9th day of November, 1863, to the respective times of delivery was $38,617.04 beyond the amount allowed by the Quartermaster's Department and the accounting officers as stated in the third finding." (5 finding Rec., p. 9).

Nevertheless the court, assigning no reasons, either by way of rulings or opinion, dismissed the petition.

Assignment of Error.

The court erred in dismissing the petition, and in refusing to allow the claimant the amount of the true advance in the cost of labor and materials, $38,617.04.

Argument.

Though no reason is assigned for the decision, it clearly proceeded on the ruling of the same court in the case of Bostwick *vs.* The United States, decided by this court at the last term, and reported in 94 U. S., 53, in which the United States, having rented a house for $500 per month for one year, reduced the rent during the year, and refused to pay more than $250 per month; and the claimant receipted for that sum as in full for rent—such being the form required by the Government officers.

The Court of Claims held that the claimant was barred of his further demands by receipt of the smaller sum. Ib., p. 63.

But this court said:

"The United States hired for a year absolutely at the agreed rent of $500 a month, and occupied during the whole of that term. They thereupon, by their agreement, were expressly bound to pay rent at that rate for the whole of the year. They have paid rent in full to June 30; but after that, until the end of the year (August 23, 1862,) their payments have been only at the rate of $250 a month. *Payment by a debtor of a part of his debt is not a satisfaction of the whole, except it be made and accepted upon some new consideration.* All that appears is that an account was made out for the rent from July 1 to September 30 at the new rate, and that this amount was receipted by Mr. Lovett, after payment. Upon this finding, therefore, in the absence of anything more showing that the

reduction in the rent of the past year was part of an agreement to continue the lease beyond the year upon new terms, the petitioner will be entitled to judgment for rent, at the rate of $250 a month, from June 30 to August 23, 1862, *that being the balance remaining after deducting payments made.*" Pp. 66, 67.

Now all that appears in this case is that the Quartermaster General and accounting officers having before them the claimant's account for $151,558 17, sent him a draft for 97,507.75, which draft the claimant received and endorsed in order to draw the money. 3d Finding, Rec., p. 9.

The present case is a little stronger for the claimant, than that of Bostwick, inasmuch as he signed no receipt for the money paid. There is in this case, as in the Bostwick case, an express written contract to pay a sum to be ascertained. The sum is ascertained by the court, and payment would seem to follow.

I do not presume that the former suit upon a different undertaking, mentioned in the 4th finding, could have been considered by the court as a bar, and shall not at present trouble the court with any argument on that point.

There is a plea of limitations in the case, but as the engines were all delivered between the 3d of May and 30th of June, 1864, (2d finding, Rec., p. 8) and the suit was brought May 2, 1870, (Rec., p. 1,) it was clearly in time.

Conclusion.

I submit that the judgment should be reversed and the cause remanded, with directions to enter judgment in favor of the claimant for $38,617.94.

JOHN D. McPHERSON,

For Appellant.

In the Supreme Court of the United States.

OCTOBER TERM, 1877.

MATTHEW BAIRD
vs.
THE UNITED STATES. } No. 196.

APPEAL FROM THE COURT OF CLAIMS.

Brief for the United States.

In the Supreme Court of the United States.

OCTOBER TERM, 1877.

MATTHEW BAIRD
vs.
THE UNITED STATES. } No. 196.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

The claimant brings this suit as surviving partner of M. W. Baldwin & Co., upon account of *advance of price for materials and labor* in connection with certain locomotives built by them for the United States, in 1863.

The contract made by Baldwin & Co. expressly gave them the right to compensation for such advance (Record, folios 16, &c.)

In September, 1864, they presented to the defendants a claim therefor, including United States excise tax and interest, amounting to $151,558.17. This was duly audited and was allowed for $97,507.75. Baldwin & Co. received that amount by draft (dated April 8, 1865) indorsed by them, such indorsement being the only acknowledgment given by them therefor, (folio 20).

The parties to this case are the same as those in the

case of Baird *vs.* The United States, (in the Supreme Court of the United States, reported 8 C. Cls. R., 143).

Five years afterward this suit was brought to recover $38,617.07, "*the residue of the amount of advance in labor and materials*," &c.

It seems that the *rationale* of the settlement in April, 1865, was that the United States differed with the present claimant as to the amount of the *advance*, &c., and offered him therefor the sum of money then paid; that is, they offered it *not on account*, but *in satisfaction*. When he received it, he received it as they paid it, and therefore has been satisfied. This is not a case of a claim consisting of various *items*, some of which were wholly rejected at a previous auditing and settlement. It may be that, under circumstances like those here, an acceptance of money for items allowed would not prevent a subsequent suit for the items rejected. Here, however, the payment was *in block*, and covered every item; and, as it seems, must have been, to the knowledge of the claimant, *intended* by the United States to be *in full*. Therefore the claimant either has been actually paid in full, or is estopped (in pais) to deny it.

S. F. PHILLIPS,
Solicitor-General.